Same-Sex Domestic Violence

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SAME-SEX DOMESTIC VIOLENCE: CLAIMING A DOMESTIC SPHERE WHILE RISKING NEGATIVE STEREOTYPES

by NANCY J. KNAUER*

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INTRODUCTION

The lesbian and gay communities have been reluctant to discuss same-sex domestic violence for fear of validating negative stereotypes of same-sex relationships and detracting from the push for the legal recognition of such relationships. The relative silence on this issue continues despite the fact

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1. See Rosalind Bentley, Poster Campaign Aims at Educating Public About Same-Sex Domestic Abuse, STAR TRIB. (Minn.), Oct. 7, 1997, at B3 (noting that recognition of problem might assist those who oppose civil rights for gays and lesbians). A recent visit to the websites of mainstream lesbian and gay advocacy organizations, including the lesbian and gay rights project
that individuals in same-sex relationships are more likely to be abused by their partners than beaten in an act of anti-gay violence\textsuperscript{2} and despite recent legislative efforts to restrict domestic violence laws to cover only opposite-sex couples.\textsuperscript{3} Nor has it stopped anti-gay organizations from using same-sex domestic violence to bolster their assertions that homosexuality is a dangerous lifestyle and that same-sex relationships are unhealthy, unstable, violent, and sick.\textsuperscript{4}

The political downside of discussing same-sex domestic violence is obvious. By reinforcing negative stereotypes, the recognition of same-sex violence risks destabilizing the emerging positive image of same-sex relationships popularized by the media and the on-going legal fight for equal marriage rights.\textsuperscript{5} Same-sex domestic violence forces a discussion of same-sex relationships that is not crafted solely for political advantage, but instead reflects the multivalent nature of identity and the lived experiences of individuals in same-sex relationships whether they identify themselves as gay, lesbian, bisexual, heterosexual, or queer.\textsuperscript{6} It demands a picture of same-sex relationships that leaves room for the separations, the custody battles, and the fact that violence occurs in same-sex relationships with the same


2. For a discussion of the prevalence of same-sex domestic violence, see infra text accompanying notes 21-29.

3. For a discussion of the various legislative attempts to restrict domestic violence protections to opposite-sex couples, see infra text accompanying notes 120-37.

4. In fact, anti-gay literature now regularly associates domestic violence with lesbianism, thereby providing a counterpoint to its discussions of gay men and their increased risk of HIV infection. For a discussion of this strategy, see infra text accompanying notes 35-42.

5. This one-dimensional positive image of same-sex relationships has been the subject of considerable critique and comment. See, e.g., Sheila Rose Foster, The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage, 7 TEMP. POL. & CIV. RTS. L. REV. 319, 325 (1998) (discussing "gay version of the 'Huxtable Family Syndrome' and the 'phenomenon of selective mainstreaming'").

6. This Article uses the term "same-sex couple" or "same-sex relationship" rather than gay or lesbian couple to stress the fluidity of identity and note that not everyone in a same-sex relationship identifies as gay or lesbian, despite how others may perceive them. For the same reason, it uses the term "opposite-sex couple" or "opposite-sex relationship" rather than heterosexual couple. See ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 7 (1997) (asking "is the man who lives with his wife and children, but from time to time has casual or anonymous sex with other men, homosexual?"). Admittedly, both constructions assume that sex has a degree of certainty, and they do not account for the consideration of transgendered identifications.
frequency that it does in opposite-sex relationships.  

Same-sex domestic violence also challenges our highly gendered (and heteronormative) understanding of domestic violence because it cannot be explained by reference to gender difference, the historical subjugation of women, or the private nature of family violence. For years feminists have argued that the boundaries of the domestic or private sphere act as a shield for domestic violence. Now, domestic violence laws provide special services and enhanced protections precisely because the violence occurs in the domestic sphere. 

A domestic or private sphere is something that same-sex couples have never enjoyed. To claim domestic violence protections, lesbian and gay advocates must first argue for something that feminists have identified as a situs of oppression—a private sphere of family life. This is because the recognition of same-sex domestic violence requires the recognition of same-sex relationships. However, after arguing that same-sex relationships are worthy of such recognition, advocates must then explain the violence that can occur within these relationships.

Part I outlines the current, albeit limited, information on same-sex domestic violence and discusses how it destabilizes the emerging gay-positive model of same-sex relationships and the prevailing gendered (and heteronormative) paradigm of domestic violence. Part II summarizes the current state of the law regarding same-sex domestic violence and efforts of state legislators to restrict domestic violence laws to opposite-sex couples. Part III asserts that even if domestic violence laws are extended to cover same-sex couples, there remain serious obstacles to individuals who would otherwise benefit from such protections, including internalized homophobia and the perceived homophobia on the part of the police, the judiciary, social service workers, and even domestic violence advocates.

I. SAME-SEX DOMESTIC VIOLENCE

Same-sex domestic violence is a difficult topic. It has received little

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7. See infra note 16.
8. For a discussion of the role of the private or domestic sphere in the understanding of domestic violence see infra text accompanying notes 86-95.
9. These enhanced protections include protection from abuse orders, mandatory arrest, shelters, increased criminal penalties, and higher bail. For a discussion of these protections see infra text accompanying notes 88-89.
10. For a discussion of the lack of “privacy” in same-sex relationships see infra text accompanying notes 91-95.
11. This fact has been acknowledged consistently by researchers and commentators. See, e.g., CLAIRE RENZETTI, VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS 119 (1992) (noting that “[b]efore you . . . can acknowledge lesbian battering, you must first acknowledge lesbian relationships.”) (quoting P. Elliot, see infra note 154); Mary Eaton, Abuse by Any Other Name: Feminism, Difference, and Intralebian Violence, in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE 195, 198 (Martha Albertson Fineman & Roxanne Mykiotik eds., 1994).
attention from the lesbian and gay communities\textsuperscript{12} or the domestic violence movement.\textsuperscript{13} For the lesbian and gay communities which are currently exerting so much time, energy, and money into securing the legal recognition and protection of same-sex relationships, raising the issue of violence risks reinforcing negative stereotypes. For the domestic violence movement, the existence of domestic violence in the absence of gender differences presents a direct challenge to the feminist construction of domestic violence as a gender-specific deployment of power and violence. Finally, to the extent that both the lesbian and gay communities and the domestic violence movement have been influenced by feminism, the discussion of female-to-female violence shakes the very foundations of cultural or "different voice" feminism.\textsuperscript{14}

\begin{itemize}
\item \textbf{A. The Numbers}

Despite the fact that same-sex domestic violence has been discussed since the 1980s, there remains little empirical work upon which to base conclusions regarding same-sex domestic violence.\textsuperscript{15} However, one thing that
\end{itemize}

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\item \textsuperscript{12} For example, the National Coalition of Anti-Violence Programs studied anti-gay violence for 13 years, but it did not turn its focus inward until 1997. See Rosalind Bentley, \textit{In a Fashion, It Was a Sick, Exquisite Game of Hide and Seek}, STAR-TRIB. (Minn.), Oct. 29, 1997, at E1.
\item \textsuperscript{13} Recent articles on domestic violence often relegate same-sex domestic violence to a footnote, if they touch on it at all. See Eaton, supra note 11, at 199 (noting trend in legal writing "to make passing reference" to same-sex domestic violence). See also infra note 23. Continuing in this trend, this Article does not address the issue of "husband battering" or female-on-male domestic violence. See generally Philip W. Cook, \textit{Abused Men: The Hidden Side of Domestic Violence} (1997).
does seem clear is that same-sex domestic violence occurs with the same
frequency as opposite-sex domestic violence.16 It manifests as the same
exercise of control through the use of coercion, violence, threats, and verbal
and psychological abuse.17 It can be just as debilitating as opposite-sex
domestic violence and just as deadly. In the year preceding this Symposium,
the Philadelphia newspapers reported three separate incidents of suicide
and/or murder stemming from abusive lesbian relationships.18 By now we are
all familiar with “battered woman’s syndrome,”19 but the published reports

PATRICK LETELLIER, MEN WHO BEAT THE MEN WHO LOVE THEM (1991); NAMING THE
VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING, (K. Lobel ed., 1986); RENZETTI,
supra note 11. Not one represents a broad-based empirical study. For example, Renzetti makes
the limitations of her study explicit. See RENZETTI, supra note 11, at 14-15 (explaining that it is a
non-random study of women who identified themselves as battered). Although not designed to
determine the prevalence of abuse in lesbian relationships, Renzetti’s study does address the
question of the incidence of battering in abusive relationships and the forms the battering takes.
See id. at 19. For more information on the topic of woman-on-woman domestic violence see the
website of Advocates for Abused and Battered Lesbians [hereinafter “AABL”]. See AABL,
You Can't Beat a Woman Even if You Are a Woman (visited June 18, 1998)

16. “Domestic abuse occurs in 25 to 33 percent of gay and lesbian relationships—a level
comparable to that of heterosexual couples—but most communities across the country have few
if any services to deal with the problem.” Emily Gurnon, Domestic Abuse Study Spotlights Gays:
Need for Better Care, Laws; S.F. has More Legal and Support Services Than Most Cities, S.F.
also Elaine Herscher, Gay Domestic Violence Mirrors Society at Large: Battering as Common
Among Gays as Straights 1 in 3 Gay Couples Suffer Battering, Study Finds, S.F. CHRON., Oct. 6,
1997, at A1 (noting that conclusions are based on “academic” studies conducted from 1986 to
1997).

17. Domestic violence has been defined in a variety of ways. For a discussion of the various
definitions see infra note 23. Some commentators reject the term “domestic violence” because
of the fear that the modifier “domestic” trivializes the violence. Instead, they opt for
constructions such as “intimate violence” or “partner abuse.” See, e.g., Goldfarb, supra note 15,
at 582 n.6 (noting the “trivializing effect” of “domestic” and adopting instead the term “intimate
violence”). However, individuals in same-sex relationships are often denied the protections
afforded by domestic violence laws precisely because their relationship is not recognized—is not
considered “domestic.” For this reason, this Article uses the term “domestic violence” in lieu of
“intimate violence” or something more generic.

18. See Victoria A. Brownworth, Murderous Intent, 8 CURVE 37, Sept. 1998. At the end of
May 1998, Maria Price shot and seriously wounded her girlfriend, Carolyn Streater, an off-duty
police officer and then killed herself. See Barbara Boyer, Lover Shoots Officer, Kills Self,
PHILA. INQUIRER, June 1, 1998, at B1. In February 1998, Lisa Miles was allegedly shot and
killed by her former girlfriend after a stand-off with the police. See Leon Taylor & Julie Knipe
Brown, Lover's Fatal Siege, PHILA. DAILY NEWS, Feb. 11, 1998, at 3. Finally, in December 1997,
a woman killed herself and shot her girlfriend’s five-year-old son. See Brownworth supra, at 37.

19. The battered woman’s syndrome has been criticized as reinforcing gender stereotypes of
white middle-class married women and thereby presenting an ideal of the battered woman which
does not reflect the experiences of many women. This is particularly true in the case of African-
American women and women in same-sex relationships. See Linda L. Ammons, Mules,
Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman
and the Battered Woman's Syndrome, 1995 Wis. L. REV. 1003, 1005 (discussing how stereotypes
of battered women disadvantage African-American women); Goldfarb, supra note 15, at 586-90
(discussing difficulty of crafting clemency claim for lesion accused of killing abusive partner).
explained that these women who killed were the batterers and not the abused.20

The most comprehensive study of same-sex domestic violence was conducted by the National Coalition of Anti-Violence Programs.21 Released in 1997, the study compiled accounts of domestic violence reported by twelve different organizations which monitor anti-gay violence.22 The study defines domestic violence as "verbal, physical, financial, and/or sexual abuse occurring in the context of a romantic relationship."23 It estimates that between 25% and 33% of same-sex relationships involve physical or psychological abuse.24 This is comparable to estimates of the incidence of violence in opposite-sex relationships.25 It is these findings that have led to the conclusion that an individual in a same-sex relationship is more likely to be abused by his or her partner than beaten in an act of anti-gay violence.26

It also seems clear that as public awareness regarding same-sex domestic violence increases, so too do the number of reported cases. A survey released in October 1998 shows a 41% nationwide increase in reported cases of same-sex domestic violence.27 The increase was 67% in San Francisco where the District Attorney’s Office has hired a victims’ advocate specifically

20. See Brownworth, supra note 18, at 37. Brownworth makes this connection clear when she urges the lesbian community to take the issue seriously “before another lesbian finds herself staring down the barrel of a gun. Or poised to pull the trigger.” Id.
22. See id.
23. Patricia G. Barnes, “It’s Just A Quarell: Some States Offer No Domestic Violence Protection to Gays,” A.B.A. J., 24, 25, Feb. 1998. The definition of domestic violence is subject to some variation. For example, Island and Letellier describe gay men’s domestic violence as “any unwanted physical force, psychological abuse, material or property destruction, inflicted on one man by another.” Nick Kirby & Beverley Kemp, Battered Men Come Out of the Closet, THE INDEPENDENT (London), Mar. 8, 1995, at 23 (quoting the definition). Claire Renzetti defines “lesbian battering” as a “pattern of violent [or] coercive behaviors whereby a lesbian seeks to control the thoughts, beliefs, or conduct of her intimate partner or to punish the intimate for resisting the perpetrator’s control.” RENZETTI, supra note 11, at 7 (quoting and adopting definition used by pervious researcher). Established at the request of Congress, the Panel on Research on Violence Against Women uses the term “intimate partner violence” to refer to a “pattern of violent and abusive behaviors by intimate partners, that is, spouses, ex-spouses, boyfriends and girlfriends, and ex-boyfriends and ex-girlfriends.” NATIONAL RESEARCH COUNCIL, UNDERSTANDING VIOLENCE AGAINST WOMEN 17 (Nancy A. Crowell & Ann W. Burgess eds., 1996). A footnote to the preceding sentence explains that “[a]lthough lesbian couples are technically included in this definition, there has been very little research on violence in lesbian (or male gay) relationships, and it is not covered separately in this report.” Id. at 21.
25. See id.
26. In 1995, the number of same-sex domestic violence cases in San Francisco outnumbered the cases of anti-gay violence. See Davis Tuller, Statistics Released on Gay Domestic Violence, S. F. CHRON., Oct. 23, 1996, at A17. See also Chuck Nowlen, Secrecy Shrouds Torment of Gay Victims of Abuse, CAPITAL TIMES (Madison, Wis.), Oct. 5, 1998, at A2 (quoting same-sex domestic violence activist as saying “[t]he irony is that gay men and lesbians are at risk of violence at the hands of their partners than they are from so-called gay bashers.”).
27. See Julie Chao, Reported Partner Abuse Among Gays Increasing; Victims Apparent Seeking Help More, S. F. EXAM., Oct. 6, 1998, at A4. The survey concludes that the rise is due to increased reporting despite significant problems remaining with police response. See id.
to deal with instances of same-sex domestic violence. Of course, increased public awareness and official recognition have their limits. As discussed below in Part III, even where the law recognizes same-sex domestic violence, homophobia will continue to present significant obstacles for the victims who may be reluctant to reveal their sexual orientation to family, social workers, the police, or court personnel.

B. Reinforcing Negative Stereotypes

There are two reasons that the gay and lesbian communities have been slow to acknowledge the existence of same-sex domestic violence. First, the recognition of same-sex domestic violence is potentially politically damaging. The second, and related reason, is that the lesbian and gay communities have worked very hard to create a positive picture of an egalitarian “alternative lifestyle.” As Patrick Letellier, author of a book on gay male domestic violence, explains, “[i]t means that our relationships may be no more egalitarian than heterosexuals because some of us also deliberately frighten, injure, and even kill our partners. It means that the so-called queer utopias we have worked so hard to create cannot protect us from violence.” For lesbians whose identities were forged within the mantel of lesbian feminism, the reluctance can be even more pronounced. As Sandra Lundy explains, “[l]esbian communities, for instance, may be reluctant for ideological reasons to acknowledge that women can batter other women, because to do so would mean shattering a utopic vision of a peaceful, woman-centered world.”

The fact that anti-gay organizations have begun to include same-sex domestic violence as a peril of homosexuality seems to confirm these fears. For example, a recent edition of Culture Facts, a weekly publication of a conservative anti-gay organization, the Family Research Council, carried a

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28. See id. See also Elaine Herscher, Reports of Gay Abuse Increase 67% in S.F., S.F. CHRON., Oct. 6, 1998, at A19 (citing the survey).
29. See infra text accompanying notes 142-66.
30. See Eaton, supra note 11, at 217 (noting reluctance is result of “ideals” regarding lesbian community and “concerns” regarding potential misuse of information by anti-gay forces).
31. See Boston Survey Suggests Gay Domestic Abuse Prevalent, NATIONAL PUBLIC RADIO, July 23, 1996, available in LEXIS, News Library, Curnws File (noting that although “[t]he problem is not new . . . gay activists say battering has been kept quiet in the gay community for political reasons.”); Ka Vang, Domestic Abuse Targeted: Gays Aim to Curb Violence BetweenPartners, CHI. TRIB., Oct. 7, 1997, at S6 (referring to same-sex domestic violence as “dirty little secret”). To quote a lesbian victim of domestic violence, “[w]e get a bad rap as it is. We don’t want to give additional ammunition to people who already don’t like us or are afraid of us.” Nowlen, supra note 26, at A2 (quoting “lesbian abuse victim who also requested anonymity”).
32. See Chao, supra note 27, at A4 (quoting Robin Nickel, director of a lesbian domestic violence program, “[i]t’s that lesbian utopianism, we don’t want to believe it happens in our own community.”).
34. Sandra E. Lundy, Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts, 28 NEW ENG. L. REV. 273, 286 (1993).
story on same-sex domestic violence entitled, "Gay Violence Escalates." It reported the inflated and misleading statistics that 47.5% of lesbians experience some form of domestic abuse compared with only 0.22% of married heterosexual women. The story appears to respond to the assertions that the brutal murder of Matthew Shepard was the result of religious anti-gay rhetoric by illustrating that, in reality, homosexuals are their own worst enemy. This strategy identifies gay men with the risk of HIV infection and lesbians with the increased risk of domestic violence.

For years the anti-gay movement has been at a loss concerning how to characterize lesbians. Much of the anti-gay rhetoric focuses on the "unhealthy" and "unnatural" sexual practices of gay men. When the anti-gay movement discussed homosexuality or the excesses of the gay lifestyle, it was almost always in reference to gay men. Same-sex domestic violence provides an opportunity to craft an independent image of lesbian relationships as violent and dangerous. A Family Research Council press release written by an "ex-lesbian" reads: "I saw fifteen of my friends die of AIDS, and I, along with many of my former lesbian friends, was a victim of


36. This contradicts the prevailing belief that same-sex domestic violence is no more or less prevalent than opposite-sex domestic violence. See supra note 16. The author of the quoted survey, later stated that the "study" was a non-random sample of gay people regarding their lifetime experiences with domestic violence. See Frank Rich, The Family Research Charade, N.Y. TIMES, Dec. 5, 1998, at A13.

37. For an explanation and critique of this reasoning, see infra note 38.

38. The next edition of Culture Facts made the connection between hate crimes and harmful homosexual activity explicit. See FAMILY RESEARCH COUNCIL, Culture Facts October 28, 1998 (visited Jan. 7, 1999) <http://www.frc.org/culture/cu98j4.html>. It began the "Q&A" section with the following question offered in light of the push for hate crimes legislation: "Isn't it true that homosexual newspapers and other 'gay' institutions routinely promote activity that physically harms homosexuals." Id. The answer is "yes," and these activities include sadomasochism, "promiscuous unnatural sex," and sex with children. See id. Although the text refers to "homosexuals," it is clearly talking about gay men. Rich explains that "since gay women can't be stigmatized en masse with AIDS, the council had to use real ingenuity to prove that they too, are vermin at 'much greater risk from one another.'" Rich, supra note 36, at A13 (quoting "council draft document"). Rich believes that the Family Research Council's solution is to manufacture a connection between lesbians and domestic violence. See id.


39. For a discussion of the difficulty the religious right has had in including lesbianism in its anti-gay discourse, see DIDI HERMAN, THE ANTI-GAY AGENDA 92-110 (1997).

40. See id. at 80-82. Herman refers to this as the "anarchic, hypermasculine, paganistic" representation of gay male sexuality. Id. at 80. She notes that other prevalent themes in anti-gay representations of gay male sexuality are "disease and seduction," referring specifically to increased risk of HIV infection and the seduction of young boys. See id. at 76-80.

41. See HERMAN, supra note 39, at 92-110. Herman discusses this in a chapter entitled "No Lesbians, Gay Lesbians, Feminist Lesbians." See id.
lesbian-on-lesbian violence.”

C. Challenging a Gendered (and Heteronormative) Paradigm of Domestic Violence

Authors have long ago discarded the term “wife-abuse” or “wife-beating” for the apparently gender neutral “spousal” or “partner” abuse. For example, a New York Times headline reads: “Woman’s Killer Likely to Be Her Partner, A Study Finds.”43 “Partner” certainly sounds gender neutral, but the first line reports: “More women in New York City are killed by their husbands or boyfriends than in robberies, disputes, sexual assaults, drug violence, random attacks, or any other crime in cases where the motive for the murder is known.”44 There is no mention of same-sex domestic violence or any hint that a woman’s “partner” is not necessarily male.

Same-sex domestic violence forces a re-examination of our image of domestic violence which assumes a male batterer and a female victim.45 It is this gendered understanding of domestic violence that in turn renders the violence necessarily heterosexual.46 Thus, the absence of gender difference produces two related conceptual problems: how to explain domestic violence without reference to gender roles and how to view it outside a heteronormative frame and within a context of homophobia.47

Commentators frequently point to the following practical concerns presented by same-sex domestic violence, all of which illustrate the interpretive force of gender. First, in the absence of gender difference, who is the presumed aggressor?48 When the police officers arrive at the scene how do they know whom to arrest? Often the police solve this dilemma by

44. Id.
45. Id.
46. This has been referred to as the need to revisit “the feminist archetype—in which women are victims of male oppression and inequality—to encompass women as sometimes victimizers of other outsiders.” Joan Meier, Introduction to Section II: Feminist Theories and Legal Norms; in THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE supra note 11, at 121-22. Of course, this image of domestic violence leaves no room for a male victim.
47. Rosalind Bentley explains, “[d]omestic violence is almost always portrayed in the context of heterosexuality. Man = abuser; woman = victim.” Bentley, supra note 12, at E1. She notes further, “to acknowledge same-sex domestic violence means challenging some long-held notions on women’s potential for violence, the capacity of men to be victims and the larger society’s view of gay, lesbian, bisexual, and transgender relationships.” Id.
48. See Eaton, supra note 11, at 215 (noting that “insight that the ideologies of property and privacy play a key role in permitting domestic violence to continue are arguably of little explanatory force in the lesbian context.”).
arresting both parties on the assumption that they are ‘‘mutual combatants.’’ In the case of woman-on-woman domestic violence, how does the battered women’s shelter know which woman to admit? The battered women’s movement has consistently stressed that it is important to believe the woman, but how does one determine which woman to believe?

These questions arise because same-sex domestic violence does not fit the existing gendered model of domestic violence where a male batterer seeks to control and dominate a female victim with the support of patriarchal institutions and constructs such as the family and privacy. For example, the National Research Council includes the following factors under a discussion of the ‘‘causes’’ of violence against women: ‘‘attitudes and gender schema,’’ ‘‘patriarchal family structures,’’ and the historical ‘‘status of women as property.’’ The historical subjugation of women and the private nature of domestic violence, however, cannot explain same-sex domestic violence. To the contrary, same-sex couples have never enjoyed any state sanctioned veil of privacy surrounding their relationships and the legal recognition of same-sex relationships remains a hotly contested social goal.

1. Battering as ‘‘Male’’ Behavior

Same-sex domestic violence shows women as batterers, men as victims.

49. See Barnes, supra note 23, at 24; See also Vang, supra note 31, at 36 (describing event where police arrested abused male partner for battery); Chao, supra note 27, at A4 (describing event where ‘‘officers handcuffed the victim to his batterer and put them in the same jail cell’’); Janine Zuniga, Gay Domestic Violence as an Invisible Problem, STAR-LEDGER (Newark, N.J.), Dec. 26, 1995, at B3 (describing how police often ‘‘get the wrong man’’).

50. Mary Eaton notes that ‘‘[t]he device of ‘believing the woman’ simply does not assist when ‘the woman’ can be either the victim or the abuser.’’ Eaton, supra note 11, at 198.

51. Phyllis Goldfarb describes the role of gender as follows: ‘‘Gender-specificity is characteristic of the predominant feminist theories because intimate violence is perceived to be rooted in the historical and ideological function of marriage and the family in American society.’’ Goldfarb, supra note 15, at 597. See also Wanda Teays, Standards of Perfection and Battered Women’s Self-defense, in VIOLENCE AGAINST WOMEN: PHILOSOPHICAL PERSPECTIVES 57, 60 (Stanley G. French et al. eds., 1998) (‘‘[w]hile battering and murder take place in a social context that has considered the wife subservient to and, in terms of social status, derivative of the husband.’’).

52. NATIONAL RESEARCH COUNCIL, supra note 23, at 56.

53. See id. at 62. The report notes that ‘‘[m]en raised in patriarchal family structures, which traditional gender roles are encouraged to become violent adults, to rape women acquaintances, and to batter their intimate partners than men raised in more egalitarian homes.’’ Id.

54. See id. This is included under a subheading of ‘‘societal influences.’’ See id. at 64-65.

55. Feminists have correctly asserted that the notion of the private or domestic nature of the family has shielded domestic violence from the intervention of the state because authorities have not been quick to interfere with private family matters. See Teays, supra note 51, at 60 (noting uncritically, that ‘‘[a]s a society, we are reluctant to interfere with ‘private’ behavior, short of murder, that goes on behind the closed doors of citizens’ homes.’’).

and gender as irrelevant. If gender is irrelevant, then so too is much of the existing theoretical work on domestic violence. What remains is a relatively blank slate to begin to conceptualize the deployment of power in the absence of gender difference. Before dismissing the explanatory force of gender, however, it is important to acknowledge the fluidity of gender and the fact that gender specific (or expected) behavior need not track biological sex. Accordingly, one way to preserve the gendered paradigm is to define battering as “male” behavior that can be committed, regardless of the biological sex of the offender. This maintains the constructs of male versus female behavior, but allows that gender does not necessarily follow sex. The batterer remains “male” even though she is a biological female. Conversely, the victim remains “female” even if he is a biological male. As Christine Littleton explains, it “is not that battering is non-sexual, but rather that sexual roles are non-biological.”

Eaton dismisses this approach as the “imposition of a heteronormative

57. Rosalind Bentley explains, “[t]he message is simple: domestic violence is about power and control and is no respecter of age, race, station, or orientation.” Bentley, supra note 12, at EL. This last point can be particularly unsettling to certain lesbian feminist views which theorize lesbianism as a political choice, or perhaps imperative, compelled by hegemonic patriarchy. Often associated with a brand of feminism described in law review articles as “cultural feminism,” this manner of defining one’s lesbianism has at its core an exaltation of traits and folkways associated with women, with being female. This world view offers little room for the abusive woman, except to the extent that it attempts to explain the behavior in terms of the abuser enacting “male” patterns.

58. Certainly any of the recent writing on transgendersim will confirm this point. See generally PAT CALIFIA, SEX CHANGES: THE POLITICS OF TRANSGENDERISM 1 (1998) (describing book as “an examination of transexuality, gender dysphoria, and transgendersim in the twentieth century.”). Of course, Judith Butler warns that even sex is a social construct. See JUDITH BUTLER, BODIES THAT MATTER 5 (1993). Judith Butler writes:

> When the sex/gender distinction is joined with a notion of radical linguistic constructivism ... the “sex” which is referred to as prior to gender will itself be a postulation, a construction, offered within language, as that which is prior to language, prior to construction. But this sex posited as prior to construction will, by virtue of being posited, become the effect of that very positing, the construction of construction. If gender is the social construction of sex, and if there is no access to this “sex” except by means of its construction, then it appears not only that sex is absorbed by gender, but that “sex” becomes something like a fiction, perhaps a fantasy, retroactively installed at a prelinguistic site to which there is no direct access.

Id.

59. This is what Kimberle Crenshaw refers to as “dominant resistance discourses” in that it fails to address subordination that is partially explained by ideological systems other than patriarchy. See Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1243 n.4 (1991). One of the recommendations of the report of the National Research Council is that “[a]ll research on violence against women should take into account the context within which women live their lives and in which the violence occurs ... [including] the confluence of factors such as race, socioeconomic status, age, and sexual orientation.” NATIONAL RESEARCH COUNCIL, supra note 23, at 47-48.

framework upon lesbian relationships." She notes that not only is it "insulting, [but] it is especially dangerous as a cognitive device for understanding lesbian battering, because it feeds the common myth about abusive lesbian relationships that 'butches' are batterers and 'femmes' their victims."

Leaving aside the contemporary resurgence of gender play within the lesbian communities, the continued reliance on gender seems at best a misdescription. It maintains gender difference where there is none—at least none that is respected or acknowledged by larger societal institutions. By adhering to a "dominant resistance discourse," it fails to question how power is mediated and deployed in the absence of gender difference. For example, what impact does sexual orientation have on the violence or abuse? Do other factors such as race, class, education, age, and/or ability, come into sharper relief in the absence of gender difference? How do these multiple identifications intersect, combine, and conflict? Finally, how do gender expectations continue to impact on the parties to the extent that they exist in a same-sex relationship within a gendered and heteronormative world?

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61. Eaton, supra note 11, at 207.
62. Id. For a discussion of the use of this type of argument in order to explain a battered woman who killed her female batterer, see Goldfarb, supra note 15, at 623 (discussing defense of Debra Green and her attorneys' attempt to make her case "most understandable").
63. See, e.g., BUTCH/FEMME: INSIDE LESBIAN GENDER (Sally R. Munt ed., 1998) (theorizing various manifestations of lesbian gender). Munt explains the current interest in butch/femme identities as the result of a process of reclamation and "re-appropriation." See Sally R. Munt, Introduction to BUTCH/FEMME: INSIDE LESBIAN GENDER, supra at 4. Discussing the dispute over whether gender roles are performance or identity, Munt explains:

Butch/femme is often understood as a gender characteristic which is superimposed onto the female body; in an epistemological mode it is deployed as a style of knowing, interpreting, and doing lesbian gender. Butch/femme is also mustered in an ontological framework, where it is concerned with being, with having an identity, and a kind of true self.

Id. at 1.
64. This leaves aside women who try to pass as biological men or female-to-male transsexuals.
65. See Crenshaw, supra note 59, at 1243 n.4.
66. Phyllis Goldfarb explains the possibility of power in the absence of gender difference as follows:

[G]ender has always been, and will likely remain for some time, a proxy for power. But it is not the only proxy. Power differentials and desires for control can arise in same-sex relationships for reasons independent of gender. Race, class, age, and physical or mental ability may be implicated along with factors such as personal achievement or family background. Gender ideology remains a crucial determinant in violent heteroerual relationships, but other ideologies may rise to greater relative prominence as explanations for battering in lesbian and gay relationships, and perhaps in some heterosexual relationships as well.

Goldfarb, supra note 15, at 619.
2. Homophobia: "An Extra Weapon in Their Arsenal" 67

As Phyllis Goldfarb correctly points out, gender is only one proxy for power. 68 It represents only one vector of oppression—race, class, ability, and sexual orientation are others. In the absence of gender difference, same-sex domestic violence offers insights regarding patterns of power and dominance and new overlays of stigma. Although Part III discusses the consequences of experiencing domestic violence in the context of homophobia, studies indicate that homophobia itself can factor directly in the type of abuse perpetrated by same-sex partners. 69 For the abusers, homophobia becomes "an extra weapon in their arsenal" 70 as they threaten their partners with "outing." 71 This represents a form of abuse that is "without heterosexual equivalent." 72

Homophobia in the United States often prompts (or forces) individuals in same-sex relationships to conceal their relationship or at least the sex of their partner. This concealment requires extraordinary skills in information management because the extent to which an individual chooses to be "out" may vary greatly in different aspects of her life. For example, Mary Eaton notes that "[m]any lesbians, even if 'out' in other aspects of their lives, may decide not to disclose their sexual orientation to friends, family, or employers, for fear of loss of emotional support or the ability to sustain themselves financially." 73

Threats to reveal the true nature of the relationship can provide the abuser with considerable psychological (and economic) leverage because of the perceived costs associated with being gay in a homophobic society. These costs range from loss of employment, family, friends, or custody of children, to the threat of anti-gay stranger violence. 74 In addition, threats of "outing" can relate not simply to sexual orientation, but also to HIV status. 75

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67. Sandra Lundy explains that "[s]ame-sex batterers have an extra weapon in their arsenal of terror: Homophobia, or society's fear and hatred of homosexuality." Lundy, supra note 34, at 278.

68. See Goldfarb, supra note 66.

69. See infra notes 144-63 and accompanying text.

70. See supra note 67 and accompanying text.

71. See Sheila R. McCann & Norma Wagner, Gay Victims Often Suffer in Silence to Protect Their Private Lives, SALT LAKE TRIB., May 15, 1994, at A4 (describing fear of discrimination and fear of outing); Robert D. Davila, Probing Same-sex Domestic Violence, SACRAMENTO BEE, Mar. 30, 1998, at B1 (describing victim whose batterer threatened to reveal his sexual orientation to his employer—the U.S. Air Force—and who found it easier "to take the punches and verbal abuse for three years than to report domestic violence at the hands of another man.").

72. See Eaton, supra note 11, at 206-07.

73. Id. at 206.


II. SAME-SEX DOMESTIC VIOLENCE AND THE LAW: CLAIMING A DOMESTIC OR PRIVATE SPHERE

Anti-gay legislation has become a staple on the national, state, and local levels. In recent years, this legislation has focused on rescinding anti-discrimination provisions and refusing to recognize same-sex relationships and the families they produce. While these measures have met with only varying degrees of success, the same-sex marriage laws passed by twenty-five states have been the most widespread and have received the most media attention. The anti-gay family laws also include measures limiting adoption and eligibility for the foster parent program. The latest entrant in this category is the attempt to restrict domestic violence protections to individuals with an opposite sex abuser.

This last development is not surprising because, as stated earlier, the recognition of same-sex domestic violence necessarily entails the recognition

19, 1996, at B2 (describing common threat to disclose HIV status in addition to threatened "outing").


78. After the 1993 Hawaiian Supreme Court decision in Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), state legislatures began to consider laws that would exclude same-sex couples from marriage and which would refuse to recognize a same-sex marriage performed in a sister state. This legislation raised serious questions under the Full Faith and Credit Clause of the U.S. Constitution. See generally Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 YALE L. J. 1965 (1997). See also MARK STRASSER, LEGALLY WED 1 (1997) (asserting that Defense of Marriage Act (DOMA) is unconstitutional on several grounds). On the Federal level, DOMA defines marriage for all federal purposes as a union between one man and one woman. See Pub. L. No. 104-199, § 2, 110 Stat. 2419 (codified as amended at 1 U.S.C.A. § 7 (West 1997); 28 U.S.C.A. § 1738(C) (West Supp. 1997)). It also purports to grant states the power to refuse to recognize out-of-state same-sex marriages. See id.

The web page of the American Civil Liberties Union reports that 25 states have adopted anti-marriage laws and anti-marriage laws were defeated in 24 states. See AMERICAN CIVIL LIBERTIES UNION Lesbian & Gay Rights: Statewide Anti-Gay Marriage Laws (last modified Jan. 1998) <http://www.aclu.org/issues/gay/gaymar.html>.

79. See Knauer, supra note 56, at 356-57.

of same-sex relationships.81 “Pro-family” forces argue that extending domestic violence protections to include same-sex couples legitimize same-sex relationships and extend “special rights” to homosexuals.82 Reasons to restrict domestic violence protections include appeals to history and Biblical teachings, the bans on same-sex marriage, and the existence of criminal sodomy laws. Currently, up to nine states restrict the protections to opposite-sex couples.83 The majority of the states have gender-neutral domestic violence statutes.84 However, it is not always clear whether the long-fought protections currently afforded by these gender neutral statutes apply to same-sex couples.85

A. Feminist Theory and the Domestic

For decades feminists have tried to undo the private nature of domestic violence.86 Many commentators even elect not to use the term “domestic” in relation to intimate violence for fear that it trivializes the violence.87 Paradoxically, the legal rules which now exist to address domestic violence exist precisely because of the private or domestic nature of the crime.88

81. See RENZETTI, supra note 11, at 119.
82. The “special rights” argument has been used to oppose equal marriage rights, anti-discrimination laws, and all forms of legal recognition of same-sex relationships. Didi Herman explains the origin of this argument and how it seeks to construct homosexuals as “illegitimate minorities.” HERMAN, supra note 39, at 111-36.
83. See infra notes 114-37 and accompanying text.
84. See infra notes 100-01 and accompanying text.
85. The uncertainty has produced several court challenges. See infra notes 105-06 and accompanying text. In addition there may be regional variations within a single jurisdiction. See Dina Bunn, Aurora Counts Gays Out of Abuse: Same-sex Couples Not Considered Covered by Domestic Violence Law, ROCKY MOUNTAIN NEWS, Aug. 4, 1996, at A36 (reporting that Aurora is only city in Colorado that does not consider same-sex domestic violence to be covered by state domestic violence law and as a result will not follow the mandatory arrest guidelines).
86. Elizabeth Schneider explains:
Historically, the dichotomy of “public” and “private” has been viewed as an important construct for understanding gender. The traditional notion of “separate spheres” is premised on a dichotomy between the “private” world of family and domestic life (the “women’s” sphere). And the “public” world of marketplace (the “men’s” sphere) . . . In the public sphere, sex-based exclusionary laws join with other institutional and ideological constraints to directly limit women’s participation. In the private sphere, the legal system operates more subtly. The law claims to be absent in the private sphere, and has historically refused to intervene in ongoing family relations.
87. See Goldfarb, supra note 15, at 582 n.6.
88. Martha Fineman explains, “the veil of privacy has been partly pulled aside, revealing the hierarchical nature of the family and its conceptual core of common-law inequality.” Martha Albertson Fineman, Preface to THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE, supra note 11, at xi. As Susan Hirsch notes, “[a]ctivists in the battered women’s movement were instrumental in defining woman abuse as a public, rather than a private problem and in demanding public remedies.” Susan F. Hirsch, Introduction to THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE, supra note 11, at xiii.
These protections include: civil protection from abuse orders, publicly financed shelters for abused women, enhanced punishments, police training, and mandatory arrest on probable cause in the absence of a warrant or a police witness. For same-sex couples to gain the same protections, they must first assert the private nature of their relationship and in the same breath invite, or demand, state intrusion and protection.

Same-sex couples exist outside of a state recognized private or domestic sphere. For example, the case of Michael Hardwick illustrates that in nineteen states, the police can arrest same-sex partners for consensual, noncommercial sex, in the privacy of their own home. The case of Robin Shahar shows that an individual can be fired from her state job as a result of her and her partner’s private religious commitment ceremony. Same-sex marriage is not an option in any state, which means that no state will recognize the inheritance rights or health care decision-making authority of a same-sex partner. The only protections available are those that can be secured by private contract.

B. The State of the Law

There are currently five states which specifically exclude same-sex couples from protection by affirmatively limiting domestic violence to opposite-sex couples: Arizona, Delaware, Indiana, Montana, and South Carolina. Two additional states require that a couple who is not married or

11, at 3, 5.

89. In the absence of domestic violence protections, same-sex batterers are not “subject to mandatory arrest, may get shorter prison terms or may be released with lesser bail.” Gurnon, supra note 16, at A1 (quoting Greg Merrill, co-author of study).

90. As one same-sex domestic violence activist has noted, “classifying a crime as domestic may increase the likelihood that the suspect is promptly arrested, that a higher bail is sought and that the victim is referred to domestic violence services.” Barnes, supra note 23, at 25 (quoting Greg Merrill, co-author of report on same-sex domestic violence).

91. Mary Eaton observes, “[t]he notion that a lesbian’s home is her castle, so to speak, and consequently, that state respect for lesbian privacy instills or reinforces battering lesbians’ sense of entitlement to abuse their partners, is fanciful at best.” Eaton, supra note 11, at 214.


93. Shahar v. Bowers, 114 F.3d 1097, 1099 (11th Cir. 1997) (holding that plaintiff’s rights were not violated by state revoking employment offer because of marriage to another woman), cert. denied, 118 S. Ct. 69 (1998).

94. See Knauer, supra note 56, at 351 (discussing various benefits that same-sex couples are denied because they cannot legally marry).


96. Delaware limits protected classes to family and former spouses, a man and a woman cohabiting together with or without a child of either or both, or a man and a woman living
related by blood must have a child in common to be protected by the statute. Finally, Mississippi limits its statute to “spouses, former spouses, [and] persons living as spouses . . . .” Protection from abuse orders are specifically available to same-sex couples in only four states: Hawaii, Illinois, Kentucky, and Ohio.

The remainder of the states have ambiguous gender-neutral laws that refer to “partners,” “cohabitants,” or “household members,” but do not restrict applicability on account of sex. It is probably fair to say that the vast majority of these states have not actually considered whether same-sex couples qualify. Perhaps the most disturbing twist is that many of the states with gender-neutral statutes are also sodomy states. This presents a potential catch-22 where a victim of domestic violence may first have to assert that he or she is a criminal in order to qualify for protection.

1. The Extension of Protections

Gradually, same-sex domestic violence has received official recognition in a variety of ways. Appellate court decisions in Ohio and Kentucky

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98. Miss. Code Ann. § 93-21-3 (1972 & Supp. 1998). Although a same-sex marriage ban would make it unlikely that this language would be interpreted to include same-sex partners, an Ohio appellate court did interpret similar language to include same-sex couples. See infra note 105.


100. For example, the Alaska statute defines “domestic violence” as one of several enumerated criminal offenses committed “by a household member against another household member.” Alaska Stat. § 18.66.990(3) (Michie 1990). Although the definition of “household member” includes current and former spouses, it also includes “adults or minors who live together or who have lived together.” § 18.66.990(5)(B).

101. The result has been a number of court challenges. See infra notes 105-06.

102. There are currently 19 states with criminal sodomy statutes. See supra note 92.

103. Barnes, supra note 23, at 25 (stating that “in four states: Louisiana, Maryland, Mississippi and Oklahoma—gay and lesbian victims of domestic violence may be required to confess to a criminal act to prove they share a domestic relationship.”).

104. Even before this official recognition, victims of same-sex domestic violence likely received some protections depending upon local practices. For example, a 1986-1987 Yale University study on temporary restraining orders found that orders were being issued to same-sex partners. See Gary Brown, Karin A. Keitel, Sandra E. Lundy, Comment, Starting a TRO Project: Student Representation of Battered Women, 96 Yale L.J. 1985, 2011 (1987).

and statutory changes, such as those in California and North Carolina, have extended domestic violence protection to same-sex couples.107 Numerous police departments now include same-sex domestic violence issues in sensitivity training sessions.108 In addition, both the San Francisco and San Diego District Attorney’s Offices have hired victims’ advocates.109 The District Attorney of San Francisco declared that “[g]ay, lesbian and transgender victims of domestic violence are no different from straight victims in the eyes of the law here in San Francisco.”110 In New York, Governor Pataki issued an executive order, over the objection of the state Senate, authorizing a study of domestic violence that would include same-sex couples.111

Many moves that appeared favorable to individuals in same-sex relationships signaled the beginning of longer debates regarding the proper scope of domestic violence protections. For example, after North Carolina approved a bill allowing a same-sex partner to secure a restraining order, opponents stalled a victims’ rights bill because they wanted to exclude same-sex victims of domestic violence.112 The argument was that the victims’ rights bill should not include “people breaking state laws forbidding adultery, fornication and sodomy.”113

In California, the first attempt to drop the requirement that the parties be of the “opposite sex” was unsuccessful.114 In 1990, opponents argued that domestic violence legislation was designed to protect the traditional family

living as a spouse” to include same-sex partners); State v. Yaden, 692 N.E.2d 1097, 1099 (Ohio Ct. App. 1997) (defining cohabitation).
107. For a description of the California statutory change, see infra notes 114-16 and accompanying text.
108. See Elaine Machleder, Gay Community Rallies in Bartender’s Memory, NEWSDAY (N.Y.) Jan. 27, 1998, at A27. See also Bentley, supra note 12 (noting that Minneapolis police officers have received training with regard to same-sex domestic violence since 1993).
110. DA Pledges Protection in Same-sex Violence, S.F. CHRON., May 23, 1997, at A24. The District Attorney announced the appointment at a press conference held on the birthday of the first openly gay elected official, Harvey Milk, who was assassinated in 1978 along with Mayor Moscone. See id.
111. See Raymond Hernandez, Pataki Defies Some Allies On Violence in the Home, N.Y. TIMES, Oct. 2, 1996, at B7. The State Senate wanted a definition of family or household that was limited to a heterosexual couple. See id.
unit and that unmarried partners could leave the relationship at any time.\textsuperscript{115} Further, opponents noted that the lack of gender inequities in the case of same-sex domestic violence made it less important for the state to intervene and duplicate the services that were already available by simply calling 911.\textsuperscript{116} Despite the fact that the California law was changed in 1994,\textsuperscript{117} surveys on same-sex domestic violence continue to list California as one of the states with gender neutral language where same-sex protection is considered "uncertain."\textsuperscript{118}

2. The Argument Against "Special Rights" for Homosexuals

The efforts to extend domestic violence protections to include same-sex couples have met with opposition, which labels these attempts to gain "special rights" for a sexual minority. The "special rights" argument is not new and parallels those arguments used against equal marriage rights and employment discrimination protections. The most extreme example of the "special rights" argument was presented by a criminal defendant, an alleged abuser, who asserted that his state's domestic violence law denied him equal protection because it did not cover same-sex couples.\textsuperscript{119}

In 1997, a Kentucky Court of Appeals ruled that orders of protection from domestic violence should be issued to same-sex couples, noting the gender neutral language of the statute which applies to "any family member or member of an unmarried couple."\textsuperscript{120} Before the case was decided, State Senator Tim Philpot proposed a revision to the law limiting the definition of an unmarried couple to individuals of the opposite sex.\textsuperscript{121} He stated that the purpose of the protection from abuse orders was "to protect women and children from abuse and protect a traditional family unit."\textsuperscript{122}

Again, he linked the exclusion of same-sex couples to the ban on same-sex marriage.\textsuperscript{123} In 1997, the state legislature held hearings on both the proposed ban on same-sex marriages and the exclusion of same-sex couples from domestic violence protection.\textsuperscript{124} Noting that any victim of violence is free to file criminal charges, State Senator Philpot stated, "I do not agree that gay couples fit the definition of family. It hasn’t happened in the history of the world."\textsuperscript{125}

\begin{footnotes}
115. See id.
116. See id.
117. See Bonnie Weston, Gay, In Love & Abused, ORANGE COUNTY REG., July 22, 1994, at B1 (discussing move to drop "opposite sex language from the California statute.").
118. See Barnes, supra note 23, at 25.
121. See id.
122. Id.
124. See id.
125. Id. Appeals to history are a common rhetorical device. See Nancy J. Knauer,
The debate in Arizona was particularly intense and resulted in a broad based reform bill for domestic violence not being enacted. A comprehensive revision to the protection afforded victims of domestic violence was held up because of concerns that the new provisions could apply to same-sex couples. The proposed law would have changed the relevant statutory language to “intimate partnership.” Although it passed the Arizona State House, it was defeated in the Senate. As a result, the laws covering protection from abuse orders, arrest on probable cause, removal of a weapon from the home without an arrest, and appearing before a judge before release, are not available to same-sex couples in Arizona.

State Senator John Kaites argued against the bill on the grounds that Arizona does not recognize same-sex marriage. (Of course, the same can be said of every state and the District of Columbia.) Referring to same-sex marriages, Kaites said, “And they shouldn't be recognized . . . . If a man assaults another man, it's still assault whether they live together or not.” He continued that “[w]e should not create a special classification for homosexuals living together.

The Arizona State Senate ultimately approved the revisions to the domestic violence laws, but did not extend coverage to same-sex couples. State Senator David Peterson made explicit the connection between recognizing same-sex relationships and extending domestic violence protection when he stated, “[f]or those of us who are opposed to that type of lifestyle, the mere fact that you start to break down the laws [against sodomy]

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*Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. (forthcoming 1998) (describing use of historical arguments in Congressional debate regarding the federal Defense of Marriage Act). Another witness at the hearing stressed that same-sex marriage was a moral issue. See Lawson, *supra* note 123, at B1. The Rev. Hershael York, a theology professor, warned the committee that “[w]e have experimented with marriage too much already, to our peril.” *Id.* Noting a “domino effect,” the Reverend later explained that the recognition of same-sex marriage could require teachers “to present same-sex marriages as being the same as heterosexual marriages.” *Id.*

126. See Linda Valdez, *Same-sex Clause Threatens Domestic Violence Law*, ARIZ. REPUBLIC, Mar. 27, 1998, at B4. The debate closely followed the structure of those surrounding the adoptions of the anti-marriage laws and even included a Full Faith and Credit argument concerning whether Arizona would have to recognize out-of-state protection from abuse orders issued to an individual in a same-sex relationship. See *id.*

127. See *id.* The change was based on the recommendation from a domestic violence study committee that was empanelled to review the penalties for domestic violence. See David Madrid, *Measure Not Likely to Cover Same-sex Couples*, TUCSON CITIZEN, Feb. 7, 1998, at C1.


131. *Id.*

132. *Id.*

on the books and say that’s OK is a step in the wrong direction."

Often there are other laws related to domestic violence, including treatment, services, and research, that may be limited in their application to opposite-sex couples. For example, in Minnesota, general assistance will provide reimbursement for services provided to women who are abused by a man. This means that shelters which provide services to lesbians must do so out of additional or separate funding. The recently enacted Indiana Domestic Violence Prevention and Treatment Fund limits its services to individuals who have been assaulted by, or fear imminent serious bodily injury from their “spouse or former spouse.”

Finally, the effect of the failure to recognize same-sex domestic violence can go beyond the specific cases of domestic violence to the extent it reflects the public policy of the jurisdiction. For example, the lack of recognition of same-sex domestic violence was used in a recent child custody case between two lesbian co-parents. The couple lived together in Washington where one gave birth to the child and the other adopted the child the following year. After two years the couple moved to North Carolina and separated the following year. The biological mother argued that an out-of-state second parent adoption was invalid under North Carolina law. Her attorney argued that the lack of recognition of same-sex domestic violence was evidence of the public policy of the state of North Carolina.

III. HOMOPHOBIA AND THE INDIVIDUAL EXPERIENCE

Even where there is official recognition of same-sex domestic violence, both internalized homophobia and perceived homophobia on the part of service providers present significant obstacles that victims must overcome. Some individuals do not consider the violence in their relationships to be domestic violence because they don’t know that same-sex couples experience domestic violence. As one same-sex domestic violence activist explains, "[w]hen someone pushes us down a flight of stairs, we know it’s wrong, but we don’t call it domestic violence." To increase self-awareness, numerous grass-roots organizations have orchestrated poster and other advertising

134. Fischer, supra note 133, at B3.
135. See Bentley, supra note 12, at E1.
136. See id.
137. See IND. CODE ANN. § 12-18-4-12 (West 1994).
139. See id.
140. See id.
141. See id.
142. Herscher, supra note 16, at A1 (quoting Greg Merrill, co-author of report). Merrill also said that “[p]eople in our community feel immune.” Id. See also Bentley, supra note 12, at E1 (noting that “[m]any GLBT victims don’t think that domestic abuse applies to them.”).
campaigns.143 Even Dear Abby has taken up the cause by specifically mentioning same-sex domestic violence and stressing that "[d]omestic violence cuts across all social, economic, educational, religious, ethnic and cultural lines."144

A. Enhanced Stigma?

Homophobia also adds to the stigma attached to seeking help or intervention because "[a]lthough sexual orientation has little impact on the frequency of domestic violence, it can strongly affect how and when society intervenes."145 When a victim of same-sex domestic violence asks for help, she must disclose her sexual orientation to therapists, friends, family, shelters, police, and the court system.146 On a personal level, coming out to one's family concerning the abuse may require explaining for the first time the exact nature of the relationship. The abuse may simply confirm the misperceptions held by family members concerning homosexuality. Recent anti-gay media campaigns have attempted to get parents to urge their homosexual children to seek help and get out of the dangerous gay lifestyle.147 The existence of domestic abuse may only confirm those fears. For these reasons, Joan Meier contends that:

victims of [intralesbian] violence are silenced even more than female victims of heterosexual battering. Intralesbian violence is denied by the dominant culture (through the legal system), the feminist subculture (represented by the shelters), and the lesbian community, because it does not fit the stereotypes prevalent in any of these. The lesbian community's reluctance to "air its dirty laundry" in public may be shared by the black community, but the utter denial of lesbian battering by both the feminist and dominant cultures sets it apart fundamentally from the problems faced by both black and white heterosexual battered women.148

B. The Provision of Services

Homophobia also figures in the provision of services, most notably the availability of shelter space. For abused men, there are simply no shelters.149

143. See Bentley, supra note 12, at E1 (describing poster campaign in Twin Cities).
144. Abby Van Buren, 'Nightmare: Must Wake Up and Get Help,' CIN. ENQUIRER, Jan. 21, 1998, at E2 (stating "I have received letters concerning women who physically abuse their boyfriends and husbands, and domestic violence occurs in same-sex unions.").
146. See Bentley, supra note 12, at E1 (noting that "[a]cknowledging violence, for some, means coming out.").
147. For a description of the "ex-gay" movement, see John Leland & Mark Miller, Can Gays 'Convert?', NEWSWEEK, Aug. 17, 1998, at 47.
148. Meier, supra note 45. In addition, "the battered lesbian and gay man 'is faced with far greater loneliness.'" Lundy, supra note 34, at 280 (quoting psychologist Nancy Hammond).
149. See Becky Beaupre, No Place to Run for Male Victims of Domestic Abuse: Shelters, Support Groups Rare for Men, DET. NEWS, Apr. 20, 1997, at A1; Vang, supra note 31, at S6 (reporting that "there aren't any shelters for male victims of domestic violence in the country.").
As explained above, even for women, some states restrict the funding and services to women who have been abused by men.\textsuperscript{150} Even where access to services is not restricted, there is the potential that shelters will not be receptive to women in same-sex relationships.\textsuperscript{151} Some lesbians report feeling unwelcome at shelters. Apparently, this relates to the other residents' discomfort over having lesbians in "shared sleeping space."\textsuperscript{152} One avenue for the abused woman is to lie or conceal the true nature of her batterer. Obviously, to the extent a woman involved in a same-sex relationship feels unwelcome in a shelter, it is more difficult "to heal from their trauma, if they are told that they have to change the pronoun of the person who abused them to receive treatment."\textsuperscript{153}

There is also the sense that the governing bodies of shelters may be less than "gay friendly" because of the need to attract funding.\textsuperscript{154} In 1990, J. Irvine noted, "[a]s shelters have gotten state and federal money, they have decided to clean up their image, so to speak. They want lesbian staff to be less blatant. If shelters are seen to be hotbeds, it will cut funding."\textsuperscript{155} The apprehension regarding funding may be traced to the well-publicized attempt by then Attorney General Edwin Meese to revoke a Justice Department grant to the National Coalition Against Domestic Violence because it was too "pro-lesbian."\textsuperscript{156}

It is also possible that a lesbian victim may arrive at the shelter only to find that her batterer is already there.\textsuperscript{157} (Or her batterer works there.)\textsuperscript{158} Research indicates that sometimes "lesbian batterers will identify themselves as victims and seek admission to shelters."\textsuperscript{159} When both women present themselves to the shelter, the staff must determine who is the "true" victim.\textsuperscript{160} In recent years, various educational programs have attempted to address the issue of homophobia among shelter workers.\textsuperscript{161} Further, commentators have noted that the safety of the shelter for the abused lesbian is compromised.

\textsuperscript{150} See supra notes 135-37 and accompanying text.
\textsuperscript{151} See RENZETTI, supra note 11, at 125 (noting that lesbian "runs the risk of incurring hostility and ostracism from other shelter residents.").
\textsuperscript{152} Bentley, supra note 12, at E1.
\textsuperscript{153} Vang, supra note 31, at S6 (quoting Jennifer Rakowski, worker for Community United Against Violence, gay social service agency headquartered in San Francisco).
\textsuperscript{154} See RENZETTI, supra note 11, at 96. The question of funding or the fear of losing funding is often cited as a reason for not providing services to lesbians. See Lundy, supra note 34, at 287-88. The need to secure state and federal funding has been credited with rising homophobia. See RENZETTI, supra note 11, at 96 (quoting J. Irvine, Lesbian Battering: The Search for Shelter, in CONFRONTING LESBIAN BATTERING 25 (P. Elliott ed., 1990)).
\textsuperscript{155} RENZETTI, supra note 11, at 96 (quoting Irvine).
\textsuperscript{156} Goldfarb, supra note 15, at 595 n.60.
\textsuperscript{157} See Seligman, supra note 109, at A1.
\textsuperscript{158} See RENZETTI, supra note 11, at 95.
\textsuperscript{159} RENZETTI, supra note 11, at 95 (noting that this is particularly true if victim has tried to defend herself).
\textsuperscript{160} See id. at 95. See also Eaton, supra note 11, at 198.
\textsuperscript{161} See RENZETTI, supra note 11, at 122-23 (discussing efforts to educate shelter workers and results of survey of shelter workers conducted in 1991).
because it is much easier for a female batterer to find its location.162 “If the lesbian batterer knows where the shelter is, it eliminates it as a safe place of refuge for the woman she is battering.”163

C. The Police Response and the Myth of 911

In order to claim the special protections available to victims of domestic violence, a victim must trust the response of the police. Same-sex domestic violence activists report that “[o]ften, victims are afraid to even call the police. They’re afraid if they do, they’ll just get beat up again; they’re also afraid of how the authorities might react.”164 Despite numerous police sensitivity programs that now include segments about same-sex domestic violence,165 there remains a widespread distrust of police on the part of the gay and lesbian communities166 which is consistent with the distrust of authorities experienced by many minority communities.167

The “special rights” argument explains that domestic violence protection is not necessary because individuals in same-sex relationships can pick up the phone and dial 911 to report an assault or terrorist threats just like any one else. This denies the widespread belief that law enforcement will not “respond to violent situations between lesbian or gay partners in the same manner as it responds to violence between strangers.”168 So if on one hand, same-sex relationships do not warrant special protection because they are unnatural, it is disingenuous to assert that these same individuals, in these unnatural relationships, will be treated just like any other victim under the criminal laws. In fact, many individuals in same-sex relationships are considered criminals under their state sodomy law. They do not call 911 out of fear that the police will not be responsive, that they will be dismissive, or worse.

Milwaukee has spent a considerable amount of time and energy on increasing police sensitivity and public awareness of same-sex domestic

162. See Da Luz, supra note 114, at 271. Moreover, the overlap between the lesbian community and members of the battered women’s movement means that often the location of the shelter is widely known. Renzetti notes that this dissemination of information is based on “the longstanding belief that batterers are men.” RENZETTI, supra note 11, at 122-23. Accordingly, women have felt free to discuss the location amongst themselves. See id.

163. RENZETTI, supra note 11, at 122-23 (quoting J. Irvine, Lesbian Battering: The Search for Shelter, in CONFRONTING LESBIAN BATTERING 25 (P. Elliott ed., 1990)).

164. Nowlen, supra note 26, at A2.

165. See supra note 108 and accompanying text.

166. “Homosexuals have long been wary of police response to calls for help, citing persistent evidence of hostility toward them, as well as indifference, ridicule and violence on the part of officers themselves.” Zuniga, supra note 49, at B3. See also NATIONAL PUBLIC RADIO, supra note 31 (quoting lesbian Boston police officer as stating “some cops have really totally horrible attitudes, and it’s scary.”).

167. “The gay and lesbian community, like many minority communities, historically has not enjoyed the best relations with local police departments.” Machleder, supra note 108, at A27 (describing difficulty encountered in getting police to pursue murder investigation of death of gay man from Queens).

168. Da Luz, supra note 114, at 274.
violence. This level of interest stems directly from the events that unfolded one evening in 1991 when the Milwaukee police responded to a 911 call from concerned neighbors. It is an event that continues to be raised in articles concerning same-sex domestic violence.\textsuperscript{169}

Describing a fourteen-year-old Laotian boy, the caller to 911 said, "[h]e’s buck naked. He has been beaten up . . . he is really hurt . . . he needs some help."\textsuperscript{170} The police who arrived on the scene quickly had the matter under control. They dismissed the ambulance and laughingly described their encounter. "Intoxicated Asian, naked male, was returned to his sober boyfriend."\textsuperscript{171}

It was only much later that the public learned that the young man was fourteen-year-old Konerak Sinthasomphone.\textsuperscript{172} The Milwaukee police had returned Konerak to his "sober boyfriend," Jeffrey Dahmer. Konerak was the thirteenth of Dahmer's seventeen victims.\textsuperscript{173} Had the police bothered to look around Dahmer's apartment when they delivered Konerak to his "sober boyfriend," they would have discovered Dahmer's twelfth victim in an adjoining room.\textsuperscript{174} The event illustrates the myth of 911, namely that law enforcement will not respond to violent situations between [perceived] lesbian or gay partners in the same manner as it responds to violence between strangers.\textsuperscript{175}

CONCLUSION

The story of the indifference of the Milwaukee police continues to resonate within the gay and lesbian communities.\textsuperscript{176} As a result, even in jurisdictions where same-sex domestic violence is clearly covered by existing domestic violence laws, victims may hesitate before they dial 911. Thus, legal reform or the clarification of existing gender-neutral domestic violence laws is not sufficient. Victims must be able to ask for protection or assistance without fear of police violence or community rejection. This requires

\begin{itemize}
\item 169. The incident continues to be mentioned in articles in the popular press concerning police response. See Hanania, supra note 75, at B2 (noting that "the Milwaukee police did nothing"). It also features prominently in law review articles concerning same-sex domestic violence and homophobic police responses. See, e.g., Nancy E. Murphy, Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence, 30 VAL. U. L. REV. 335 (1995).
\item 170. Sinthasomphone v. Milwaukee, 785 F. Supp. 1343, 1345 (E.D. Wis. 1992) (quoting transcript of 911 call). See also Murphy, supra note 169, at 335.
\item 171. Murphy, supra note 169, at 335 n.1 (quoting Annette Miller et al., Serial-Murder After-Shocks, NEWSWEEK, Aug. 12, 1991, at 29).
\item 172. For an enlightening analysis of the Konerak Sinthasomphone case that considers the impact of race and sexual orientation on the actions of the police officers, see Darren Lenard Hutchinson, Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse, 29 CONN. L. REV. 561, 575-83 (1997).
\item 173. Konerak became Dahmer's 13th victim thirty minutes after the police left. See Sinthasomphone v. Milwaukee, 878 F. Supp. 147, 149 (E.D. Wis. 1995).
\item 174. See id.
\item 175. See Da Luz, supra note 114, at 274.
\item 176. See supra note 169.
\end{itemize}
grappling with homophobia, as well as the reluctance of the lesbian and gay communities to address the existence of same-sex domestic violence.

Homophobia is directly implicated in this endeavor because recognizing same-sex domestic violence requires affirming that violence within same-sex relationships warrants special protections. To this end, lesbian and gay communities must construct a more nuanced image of same-sex relationships—one that includes the good with the bad. Although this is a politically difficult task, the result could be a much more realistic and inclusive image of same-sex relationships. Perhaps given a more realistic view of same-sex relationships, victims will no longer have to overcome the belief that same-sex domestic violence doesn’t exist, the shame of not living up to a community ideal, and the pain of rejection by communities not wanting to air their “dirty laundry.”177

A more realistic view of same-sex relationships will also call into question the prevailing gendered (and heteronormative) understanding of domestic violence. It will require domestic violence activists and feminists to uncouple their concepts of power and dominance from the frame of gender difference and consider the role of other identifications, such as race, age, sexual orientation, and disability, in the deployment of power and violence. Only then will domestic violence services live up to the promise of the gender-neutral vocabulary currently in use by domestic violence activists.178

The only risk involved in a public discussion of same-sex domestic violence is that it will reinforce negative stereotypes of same-sex relationships. To paraphrase Audre Lorde, our silence on this point will not protect us.179 Anti-gay organizations already exploit the fact of same-sex domestic violence to their advantage.180 The only question is whether they should be permitted to have the last word.

177. Tuller, supra note 26, at A17 (stating that “discussing domestic violence is like airing the community’s ‘dirty laundry.’”).
178. See supra text accompanying notes 43-44 (describing use of gender-neutral terms such as “partner” abuse).
179. In her essay, The Transformation of Silence into Language and Action, Audre Lorde writes: “I was going to die, if not sooner then later, whether or not I had ever spoken myself. My silences had not protected me. Your silence will not protect you.” AUDRE LORDE, SISTER OUTSIDER 41 (1996).
180. See supra text accompanying notes 35-38 (discussing activities of FAMILY RESEARCH COUNCIL).